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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1190

JOHN NUCCIO, ROSARIO LUPO and
WILLIAM CURCURATO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The above named petitioners jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case as recited *infra.*

Opinion Below

The opinion of the Court of Appeals, printed in the appendix hereto *infra,* is not yet reported. The District Court did not render any opinion as such.

Jurisdiction

The judgment of the Court of Appeals was entered on January 5, 1967 (Appendix hereto, *infra*). A timely joint petition for rehearing was denied by the Court of Appeals on January 25, 1967. Mr. Justice Harlan, by order, has

extended the time for filing this joint petition for certiorari to and including March 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioners were convicted, under a single count indictment of conspiracy to import heroin, the charge being solely importation, no "receiving", "selling" etc. being charged, and no substantive charges being involved. The indispensable inculpative testimony came from a single witness, a French airline employee named Henrypierre, who testified extensively as to alleged conspiratorial conversations which took place out of the presence of one or another of the within three petitioners. The sole question presented takes the following forms:

Were petitioners denied a fair trial by the instructions to the jury which wholly omitted any instructions to guide the Jury in handling the mass of conspiracy-hearsay proof in the case? Can federal conspiracy convictions be obtained on such hearsay proof where the Jury are told nothing whatever as to the traditional requirements which must be found by the Jury to have been satisfied before such hearsay may be considered against a particular defendant, i.e., the requirement of (a) independent proof, or proof "*aliunde*", of each defendant's knowing acceptance of membership in the conspiracy, and (b) the likewise prerequisite determination that must be made as to the existence of the conspiracy, before hearsay declarations of other defendants or co-conspirators may be deemed to have been "connected up" with a particular defendant? Does not the ruling of the Court below, approving the Jury instructions

which were silent on these points and declaring that it is for the Trial Judge above to make the prerequisite factual determinations involved, amount to approval of *pro tanto* direction of a verdict of guilt in a Federal criminal prosecution? Can the principles of due process and fair trial tolerate such a pronounced slackening of the procedural and evidentiary protections in the already amporphous law of Federal conspiracy prosecution?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment due process provision and 21 U.S.C. §174. The latter statute reads as follows:

> "§ 174. Same; penalty; evidence
>
> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had pos-

session of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc, see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, § 105, 70 Stat. 570."

Statement of the Case

1. Introductory

Petitioners were convicted in the United States District Court for the Eastern District of New York (Rayfiel, D.J.), after a jury trial, under a single count narcotics conspiracy indictment (21 U.S.C § 174) (7a*). Petitioner Nuccio was sentenced to fifteen years and a committed fine of $10,000 (56a-57a). Petitioner Lupo was sentenced to fifteen years

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* " a" refers to the Joint Appendix for Appellants in the Court below. Citations to non-printed portions of the Record On Appeal in the Court below appear *infra* as "R. ". Nine extra copies of the Joint Appendix for Appellants are filed herewith. We have also requested the Clerk of the Court below to certify for filing in this Court the entirety of the record on appeal, but we are advised that this latter item may have to be filed here under a supplemental filing; the record of the proceedings in the Court below is, of course, being filed with this joint Petition for Certiorari. In docketing the Record On Appeal in the Court below a portion of the trial testimony was numbered out of proper page series, i.e., pp. 250-322 should follow p. 165. Also, another portion of the trial proceedings was inadvertently omitted from the original docketing of the Record On Appeal in the Court below as it had not been filed in the District Court by the Court stenographer, i.e., the proceedings of April 28 and 29, 1966, which should have followed p. 525 of the Record On Appeal as originally docketed, and which were supplementarily docketed as pp. 525A to 525PP of the Record On Appeal.

and a committed fine of $5,000 (58a-59a). Petitioner Curcurato was sentenced to twelve years and a committed fine of $1,000 (60a-61a). Petitioners Nuccio and Curcurato are free on bail pending this application for certiorari. Petitioner Lupo has been unable to raise bail and is serving his sentence.

The indictment (7a) named as defendants the within three petitioners and Rose D. Carluccio; the latter defendant was severed. The indictment charged that between March 1, 1963 and January 30, 1965, within the Eastern District of New York and elsewhere, the defendants and two co-conspirators not named as defendants, Georges Henrypierre and Henri LaPorteriere, conspired to import heroin into the United States.

The main Government witness was the co-conspirator Henrypierre (R. 31 *et seq.*). Henrypierre had been employed as an airline steward for Air France (R. 34-35). He made flights to the United States in 1963, 1964 and the beginning of 1965 (R. 35). On January 29, 1965 he was arrested by customs agents at Kennedy Airport in New York (R. 35). When arrested he was carrying a package concealed in his hand baggage (R. 36-38). He had obtained this package in Paris from LaPorterie, who was not present at this trial (R. 39-40). Henrypierre said that he was taking the package to the defendant Curcurato (R. 46-47). He said that in 1963 and 1964 he took packages to Curcurato at an apartment in Queens, N. Y., about ten times (R. 50-51). He had received the ten packages from LaPorterie (R. 52). He had keys to the Queens apartment which he had received from LaPorterie in Paris (R. 55). At one stage Curcurato told Henrypierre that there was going to

be a change of apartments, and he then showed Henrypierre a new apartment in Queens, giving Henrypierre two keys (R. 56-58).

He testified also about three or four deliveries to another apartment, in Brooklyn, where he met the defendant Lupo (R. 69-71, 73).

On one visit to the Brooklyn apartment Henrypierre met the defendant Nuccio (R. 74-75). Henrypierre and Lupo were together in an automobile when they met Nuccio on that occasion (R. 75-76). Henrypierre had a package with him, but he could not remember whom he gave it to; evidently he left the package in Lupo's car ("Mr. Joe [Lupo] picked me up in the street and I leave the package in his car. And far away we met Louie [Nuccio]. He went into the car. That is the story") (R. 75-77). There was also a conversation on this latter occasion of the meeting in the car, in which "they" said "Hello, how is Henri in Paris", or "They asked me if the people in Paris is all right, feel good", and Henrypierre answered "them", "Is all right"; the name "Henri", he said, referred to LaPorterie; he did not remember exactly any further conversation, it was not a long conversation, someone had said "When you go for next time?", and he had answered "I do not know" (R. 78-79). At the end of 1964 Henrypierre also met Lupo in front of the Radio City Music Hall in New York City, giving the latter a shopping bag (R. 78, 79).

The next questioning of Henrypierre by the prosecutor deserves important attention because up to the point now to be mentioned in Henrypierre's direct examination the Court had carefully preserved the rights of each defendant with respect to hearsay statements made out of their pres-

ence, but in the item now to be noted the Court unexplainedly ceased to afford the defendants this protection. At R. 80 the prosecutor asked Henrypierre what LaPorterie in France had told him to do with the packages. At R. 43 the Court had expressly ruled that it would not allow Henrypierre "to state * * * the nature of" a conversation with LaPorterie about bringing over the packages unless "one or another of the defendants was present". Now, however, when the prosecutor asked Henrypierre the question again at R. 80 as above noted, and when the defense reminded the Court that it had previously sustained the objection, the Court inexplicably replied, "No that isn't the question that [was] asked. The question that I sustained the objection to was 'What conversation did you have?' Now this question seeks to find out what he was directed to do with the package"; to which defense counsel replied, "Well, that would be in the nature of a conversation"; but the Court nevertheless said "I will allow that" (R. 80-81).* Henrypierre's answer to the question was, "He tell me to take these package with me to New York and to put it into a certain address in New York, or in Brooklyn or in Queens, and make some phone call to New Jersey to contact Louie [Nuccio] for—to take money to Paris" (R. 81-82). Henrypierre said he telephoned the New Jersey number fifteen to twenty times, after which he met Nuccio in New York City (R. 83-85), in front of the CBS Studio on Seventh Avenue (R. 86). Nuccio gave him a package of money fifteen or twenty times altogether (R. 86-87). They would have short conversations on these occasions, in which Nuccio asked "How Henri is in Paris, tell

* A few moments later the Court did state, however, that it was permitting this testimony subject to connection (R. 82).

him Hello for me. Have you been in Brooklyn or Queens?", to which "sometime I say yes"; or Nuccio asked him "Do you know when you go back again?" (R. 87). Four or five times at the meetings with Nuccio a woman was with the latter (R. 87-88). Nuccio would give the money to Henrypierre in a package, sometimes wrapped like a gift, and sometimes in ordinary paper (R. 88-89). Henrypierre did not count the money exactly in these packages, the amount varied, "could be between $20,000 and $70,000" (R. 89-90). The money he thus received he gave to LaPorterie in Paris (R. 90) Henrypierre was paid $400 per kilo for bringing the packages to the United States (R. 90). For bringing money from the United States to Paris he was paid $100 (R. 90).

Henrypierre, prior to this trial, on September 16, 1965, pleaded guilty to narcotics tax count charges (3 counts) (R. 95-98), on which he had not yet been sentenced at the time of this trial (R. 160-164).*

In Henrypierre's cross examination it was developed that the witness had been with Nuccio and Lupo together on only the one occasion mentioned in his direct testimony (R. 314); and that he had never given any package of heroin to Nuccio (R. 316).

The Government called to the stand the co-defendant Rose Carluccio, who had been severed from this trial (R. 324 *et seq.*). She had known Nuccio over thirty years and had gone out socially with him after being widowed (R. 324-325). She resided in Cliffside Park, New Jersey, her telephone number being known to Nuccio from her husband

* The records of the District Court (65 Cr. 408) show that on June 16, 1966 Henrypierre was given an execution-suspended sentence of two years on a single tax count.

when he was alive (R. 324-326). In 1963 or 1964 she received phone calls for Nuccio (R. 326). When Nuccio would call her, she would tell him that there had been a phone call for him if such had occurred, and Nuccio would say to her, "If they call back again, tell him I'll meet him tomorrow in the same place" (R. 331-332). She also received phone calls, following such incidents, from someone, to whom she would give Nuccio's message (R. 333-335). About four times, when she went to New York with Nuccio in the latter's automobile she saw Henrypierre meet Nuccio, twice in a bar at the CBS Building, and one time when they picked Henrypierre up in their car (R. 336-340). She heard Nuccio and Henrypierre having conversations (which were of trivial import) (R. 340). Once she saw Nuccio give Henrypierre a gift-wrapped package which Nuccio said was for Henrypierre's wife (R. 341-342). On cross examination Mrs. Carluccio swore she was innocent of any narcotics activity and that she had no knowledge thereof (R. 345-346, 350); and that she knew nothing about payment of any money by Nuccio to Henrypierre (R. 347).

The defendant Curcurato took the stand in his own defense (R. 46 *et seq.*). He admitted renting the Queens apartments mentioned in the Government's testimony, for the purpose of conducting card games from which he derived a commission. He denied the indictment charges herein, and he swore that he had somewhat violently rebuffed a homosexual advance made to him by Henrypierre, whom he had met at one of the card games; at this rebuff Henrypierre in anger threatened that "I will get you" (R. 459). Henrypierre was recalled to the stand to deny Curcurato's charge of a homosexual attempt (R. 498).

The trial Court was informed on behalf of all defense counsel "that all exceptions taken to the denial of our requests be deemed to enure to the benefit of all counsel" (R. 525-"00").

The defendants requested that the jury be instructed that before considering hearsay declarations against a particular defendant they must determine from independent proof of such defendant's own act or declarations that he had in fact become a member of the conspiracy (R. 525-N, 525-S, 602, 603, 631-635).

Although the trial Court indicated that it intended to cover these latter requests (R. 525-B to 525-C) it did not do so, and the following comprises the entirety of the Court's instructions to the Jury in this case on the subject of conspiracy (38a-39a, 40a-41a, 41a-42a):

> "Before proceeding with a statement as to the burden of proof and the question of reasonable doubt, I would like to read to you a definition of a conspiracy:
>
> 'A conspiracy is a combination of two or more persons to accomplish an unlawful purpose by concerted action.'
>
> While it involves an agreement or understanding it is not necessary that the persons charged with the conspiracy meet together and enter into any formal agreement, or to state in words or writing what their plans are, and the manner in which it is to be effected.
>
> It is sufficient to show that they came to a tacit understanding, an implied understanding, if you please, as to what they were going to do, and how they were to accomplish it.

Such an agreement may be inferred from the facts and circumstances in the case and from the conduct of the parties who are charged with the (544) conspiracy, since, as I think you have already been told by at least one of counsel, a conspiracy in its very nature involves secrecy among the participants.

You don't publicize a plan to commit an illegal act.

* * * * *

Now, these are the essential elements which the Government is obliged to prove in order to justify conviction at your hands. As I said before, each of those elements must be proved beyond a reasonable doubt.

First, the Government must prove that there was one overall conspiracy to fraudulently and knowingly bring into the United States a narcotic drug contrary to law. I have defined the word fraudulently and I have defined the word knowingly, although frankly, I didn't think they needed any definition to you.

The Government must also prove that the defendant whom you happen to be having under (547) consideration at the time in your deliberations knowingly and wilfully joined the conspiracy during the period of its operation with the intent and the purpose of furthering its objective.

Three, that at least one overt act was committed by one of the conspirators—one of the alleged conspirators—to effectuate the purpose of the conspiracy.

* * * * *

Now an overt act is a manifest act committed by or alleged to have been committed by one of the alleged conspirators for the purpose of carrying out the object of the conspiracy. That act need not in

> and of itself be unlawful. It can be a perfectly innocent act. It can be an act like crossing the street, making a telephone call. But it must, however, be an act which was committed with the intent in mind of assisting in furthering an objective of the conspiracy."

Following the above quoted altogether perfunctory (see our "Reason" No. I, *infra*) charge to the Jury on the elements and proof-requisites of conspiracy, the defense expressly excepted that as to "the elements necessary to sustain a charge of conspiracy as alleged in the indictment" the Court "should have gone into greater detail on it" (45a).

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction as to each of the present three petitioners (appendix hereto, *infra*). Pertinent details of the reasoning in the opinion of the Court of Appeals are noted *infra*.

REASONS FOR GRANTING THE WRIT

The Jury Instructions on the Law of Conspiracy.

As seen, the trial Court left the Jury wholly without guidance on the vital problem of the use which the Jurors might or might not legally make of the mass of conspiracy hearsay proof in this case. We respectfully urge that the respective positions taken by the Courts below concerning this branch of the case present a major threat to the fair administration of Federal criminal justice in conspiracy prosecutions.

The Court of Appeals had the following to say on the subject in its opinion (Appendix hereto, *infra*):

> "While the judge correctly charged that the Government must prove as to each defendant that he 'knowingly and wilfully joined the conspiracy during the period of its operation with the intent and the purpose of furthering its objective,' he did not give further charges requested by defendants by which, in various ways, the jury would have been told that in determining a defendant's membership, it was 'not to consider what others may have said or done' but was to decide 'without regard to and independently of the statements and declarations of others.' Although we do not doubt that such instructions have often been given, all the law requires is that the jury find, on the basis of all evidence properly admitted by the judge, a conspiracy and each defendant's purposeful entrance into it. As indicated in our discussion of the single conspiracy issue, no preliminary showing is needed to allow the jury's consideration of what others have *done,* including 'verbal acts,' insofar as such acts show the conspiracy's existence and scope and the consequent likelihood of any defendant's being a part of it. For example, if Henrypierre's luggage had contained packages marked by LaPorterie for each of the three defendants, no one could reasonably doubt that the jury might consider this against each defendant, although it would not alone be sufficient for a conviction. And while a declaration of one alleged conspirator in furtherance of the conspiracy otherwise banned by for hearsay rule is not admissible against another without other proof of the latter's membership, the established rule in this circuit is that determination of the adequacy of such proof is for the judge and, if he is satisfied on that score, he is to leave the

declaration 'to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent.' *United States* v. *Dennis,* 183 F. 2d 201, 230-31 (2 Cir. 1950) (L. Hand, *J.*), aff'd, 341 U. S. 494 (1951).[3] Accord, *United States* v. *Pugliese,* 153 F. 2d 497, 500-01 (2 Cir. 1945); *United States* v. *Stadter,* 336 F. 2d 326, 329-30 (2 Cir. 1964), cert. denied, 380 U. S. 945 (1965); *United States* v. *Borelli, supra,* 336 F. 2d at 387. Without detracting from our reaffirmation of this position, we note that no hearsay declarations appear to have been offered here; the notion that evidentiary use of anything emerging from the mouth is banned unless it comes within an exception to the hearsay rule is as fallacious as it is durable. See *United States* v. *Costello, supra,* 352 F. 2d at 853."

The reference, in the above quotation from the opinion below, to "our discussion of the single conspiracy issue", is to a discussion appearing earlier in the opinion of a concept which the Court called "verbal acts"—i.e., the Court below earlier in the opinion had spoken, in another connection, of the idea that not all hearsay declarations of a co-conspirator need to be excluded or limitedly admissible in conspiracy cases because there are some such declarations which amount to "verbal acts". Because this "verbal act" theme in the opinion below is essential for a mean-

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[3] Judge Hand in *Dennis, supra,* 183 F. 2d at 231, made clear he was fully aware that "this conclusion permits the jury to act upon hearsay, because they may be satisfied of the 'joint undertaking' only because of the declaration." But he was satisfied, as are we, that "it often happens that hearsay is competent, and this is the only practicable way to deal with the question." See the helpful discussion by Judge Merrill in *Carbo* v. *United States,* 314 F. 2d 718, 735-38 (9 Cir. 1963), cert. denied, 377 U. S. 953 (1964).

ingful analysis of the issue we are here raising in regard to the inadequacy of the jury instructions on use of conspiracy hearsay, it is desirable to quote the aforementioned earlier portion of the opinion below where the Court of Appeals first introduced this "verbal acts" idea into its discussion of this case:

> "The only challenge to sufficiency of the evidence is the rather standard claim that the proof showed two conspiracies—in this instance one involving the two Frenchmen with Nuccio and Lupo and the other solely with Curcurato—rather than the single conspiracy which the judge told the jury it must find in order to convict. The challenge fails. Nuccio's inquiries about deliveries in Brooklyn and Queens constituted evidence linking all three defendants. Regarded as verbal acts in furtherance of the conspiracy—reminders by Nuccio to Henrypierre that his job required him to make deliveries in Brooklyn and Queens and admonitions to go there if he had not yet done so—rather than as mere testimonial declarations —'I have colleagues in Brooklyn and Queens'—they were admissible against all the defendants even without other proof of common action. *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953); *United States* v. *Costello*, 352 F. 2d 848, 853-54 (2 Cir. 1965), cert. granted as to another point, 383 U. S. 942 (1966). Whether or not these inquiries and the proof of deliveries to Lupo and Curcurato in Brooklyn and Queens would alone have been enough to prove a single conspiracy, the addition of the evidence that LaPorterie, who was known to all the defendants, had designated Nuccio as paymaster in chief, sufficed to link both Curcurato and Lupo in the overall operation. As Judge Hincks said in *United States* v. *Stromberg*, 268 F. 2d 256, 264 (2 Cir.), cert. denied,

361 U. S. 863 (1959), 'from such evidence it might rationally be inferred that one joining such a conspiracy knew that it had a scope and that, for its successful operation, it required a wide-spread organization, more comprehensive than may have been disclosed by any contact or transaction of which he had knowledge through his actual personal participation.' See also *United States* v. *Borelli*, 336 F. 2d 376, 382-84 (2 Cir. 1964), cert. denied sub nom. *Cinquegrano* v. *United States*, 379 U. S. 960 (1965). * * * "

Taking together the item just quoted from the opinion below, with the item previously quoted, we observe:

(1) Preliminarily, as regards the statement of the Court below in the first of the two above quoted portions from its opinion, that "we do not doubt that such instructions have often been given"—referring to jury instructions that proof of a particular conspiracy defendant's knowing participation in the conspiracy on the basis of independent evidence is prerequisite to consideration of conspiracy hearsay against such defendant—we are obliged to point out that the Court below has notably minimized the weight of the Federal authorities throughout the country which favor and require such jury instructions. The authorities are collected in *Jury Instructions In Federal Criminal Cases, Seventh Circuit Judicial Conference Committee On Jury Instructions*, West Publishing Co. 1965, pp. 121, 128-129; and in *Mathes and Devitt, Federal Jury Practice and Instructions* (1965), §§ 25.05 *et seq.*, pp. 236-241.

(2) The Court below apparently justifies its approval of the perfunctory conspiracy-law jury instructions in this case—which indeed were not merely perfunctory but

entirely silent on the hearsay problem—on the twofold basis that this case did not involve "hearsay" but "verbal acts", and that in any event "established rule in this Circuit is that determination of the adequacy" of independent proof of a particular defendant's membership in the conspiracy "is for the Judge and, if he is satisfied on that score, he is to leave the [hearsay] declaration 'to the Jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent' ".

(3) Even if the "verbal acts" idea is sound, or is sound as here applied by the Court below—both of which assumptions we dispute (*infra*)—it was still not factually correct, on this trial record, for the Court below to conclude that "no hearsay declarations appear to have been offered here" (as quoted *supra* from the opinion below). As is evident from our Statement of the Case, Henrypierre's testimony is saturated with assertions by him concerning declarations which were hearsay as to one or another of the within petitioners, *e.g.*,* Curcurato's allegedly telling Henrypierre that there was going to be a change of apartments in Queens (R. 56-58); an alleged conversation between Henrypierre and Curcurato in which they discussed a narcotics arrest of another person at Kennedy Airport at the end of 1964 (R. 28-62); an alleged conversation between Henrypierre and Lupo around the Summer of 1963 in which Lupo told Henrypierre to leave a package at an apartment in Brooklyn and that Henrypierre "may stay

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* Several of the following examples of the hearsay proofs introduced in this trial were not mentioned in our Statement of the Case, *supra*, where we were trying to avoid over-burdening our factual recitals at that juncture of our presentation.

in this apartment if you want, you may sleep here if you want, drink if you are thirsty" (R. 69-72); Henrypierre's testimony that Curcurato had been alias-wise named to him as "Petri" (R. 46-47, 49-51); Henrypierre's like testimony that Lupo had been identified to him alias-wise as "Joe" or "Mr. Joe" (R. 73); Henrypierre's like "alias" testimony of having met Nuccio under the name of "Mr. Louis" (R. 74-75); the alleged conversation between Henrypierre, Lupo and Nuccio, in Lupo's automobile (Curcurato not being present) in which "they" asked Henrypierre about "Henri [LaPorterie] in Paris", etc. (R. 74-79); especially important, Henrypierre's testimony of the allegedly conspiracy-initiating conversation between himself and LaPorterie in Paris in which the latter gave Henrypierre instructions as to deliveries and phone contacts in New York (R. 80-82); the testimony of Henrypierre and of the co-conspirator-defendant Rose Carluccio concerning telephone calls to the New Jersey number allegedly used by Nuccio to maintain contact with Henrypierre (R. 83-85, 326, 331-335); Henrypierre's testimony of conversations between him and Nuccio in their alleged meetings, in which Nuccio asked about "Henri" in Paris and whether Henrypierre had "been in Brooklyn or Queens" (R. 86-87); and the virtual entirety of the testimony of the severed co-defendant Rose Carluccio which related solely to her conversations with Nuccio and the alleged telephone contacts, except for her having observed a few meetings between Nuccio and Henrypierre (R. 324-342). In the face of these numerous instances of manifest conspiratorial hearsay, it is mystifying that the Court below should have deemed that "no hearsay declarations appear to have been offered here." Is it possible that all of the items of testimony which we

have just summarized as evidently plain examples of conspiracy-hearsay, can be brushed aside under the supposed doctrine of "verbal acts"? If so, there no longer exists any doctrine of "conspiracy hearsay"; and the "verbal acts" doctrine would occupy the entire field formerly occupied by "conspiracy hearsay."*

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* As a matter of fact, the only one of the several conspiratorial declarations above noted which the Court below specifically undertook to bring within the "verbal acts" idea was Nuccio's alleged inquiry to Henrypierre as to whether the latter had been in Brooklyn or Queens. We endeavored, unsuccessfully, in our Petition for Rehearing in the Court below, to convince that Court that it had apparently let itself be carried away by an artificial logic in the treatment of this incident as supposedly constituting a "verbal act"; we quote from our Petition for Rehearing in the Court below (pp. 1-3):

> "In rejecting our argument of prejudicial variance (more than one conspiracy) this Court's opinion refers, in part, to the testimony of Henrypierre that in his meetings with Nuccio the later would inquire 'whether Henrypierre had been in Brooklyn or Queens' (slip op. 759). In the Court's next reference to this same item the Court characterizes it as 'Nuccio's inquiries about deliveries in Brooklyn and Queens' (*ibid*). Three lines farther on in the opinion the Court imbues this same item with the still more meaningful character of 'reminders by Nuccio to Henrypierre that his job required him to make deliveries in Brooklyn and Queens and admonitions to go there if he had not done so,' and the Court states that, so viewed, the items involved (*viz.*, Nuccio's having inquired whether Henrypierre had been in Brooklyn or Queens), '[r]egarded as verbal acts in furtherance of the conspiracy * * * rather than mere testimonial declarations—'I have colleagues in Brooklyn and Queens'— * * * were admissible against all of the defendants even without other proof of common action' (*ibid*).
>
> 'We respectfully think the Court may not correctly have apprehended the above mentioned items of Nuccio's inquiries to Henrypierre, which evidently refer to R. 87 ('Have you been in Brooklyn or Queens'). It is apparently undisputed that Henrypierre did not deliver any packages of heroin to Nuccio (R. 316)—nor is a different conclusion required by the single incident when Henrypierre left a package in Lupo's car and they were later joined by Nuccio (R. 75-77). The picture, *via* Henrypierre's testimony and the Government's

(4) What, then, of this suggested doctrine of "verbal acts"—does it find support in authority, or in reason; is it perhaps nothing more than an innovational doctrinal enterprise on the part of the Second Circuit; does it, and can it, comport with a fair and just administration of the Federal law of criminal conspiracy; above all, does this "verbal acts" doctrine violate proper principles of Federal criminal justice when it is applied, as in this case, in combination with a rule leaving it to the Trial Judge rather than to the Jury to determine whether a particular defendant has been linked to the conspiracy by independent evidence? Let us consider first the authorities and the reasons which the

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theory, is simply, that the purpose of Henrypierre's systematic meetings with Nuccio was to receive payment for all heroin deliveries, all of which deliveries Henrypierre made to others than Nuccio. Now, if these two men, Henrypierre and Nuccio, were thus meeting each time only so that Henrypierre could be paid for deliveries that *he had already made* on each such particular occasion, how can it logically or believably be suggested (as in this Court's opinion, *supra*) that Nuccio's inquiries as to whether Henrypierre had been in Brooklyn or Queens were anything other than purely in the nature of small talk or social remarks? Is it conceivable, is there anything in the record allowing the highly improbable hypothesis, that when Nuccio would ask Henrypierre about having been in Brooklyn or Queens and at that same time would be handing over to Henrypierre a *pre-packaged* bundle of money, that Nuccio did not already know (under the Government's theory) on each such occasion exactly what delivery (and in what amount) Henrypierre had already made *prior* to that payment occasion?

Therefore, it respectfully seems to us that this Court's interpretation of Nuccio's inquiries about Brooklyn and Queens as being possible to be regarded as 'verbal acts' consisting of 'reminders' to Henrypierre 'that his job required him to make deliveries in Brooklyn and Queens and admonitions to go there if he had not done so' is an interpretation not only unjustified by the few casually spoken words composing the inquiries, but is also absolutely irreconcilable with the whole heart and vitals of the Government's theory of the case (and of Henrypierre's testimony on this branch of the case)."

Court below has adduced to justify the "verbal acts" doctrine as such. The cases cited by the Court below are *Lutwak* v. *United States*, 344 U.S. 604, 617-619, and *United States* v. *Costello*, 352 F. 2d 848, 853-854 (C.A. 2 1965), cert. granted as to another point, 383 U.S. 942. *Lutwak*, unless we have missed some nuance perceived by the Court below, has no discernible bearing on any "verbal acts" idea, but seems rather to be concerned with the difference between "acts" and "declarations". *Costello, supra*, has at best, as we read it, only an obscure bearing on the "verbal acts" idea and it does not employ the latter term; in fact it seems very doubtful that *Costello* has any distinct relation to the problem of "verbal acts" at all in the form in which that problem is treated by the Court below in our case. *Costello* distinguishes between co-conspirators' declarations "from which the Jury was to infer the truth of the matter asserted," and such declarations which "described acts, and no out-of-court utterance" of a co-conspirator which "was being offered to prove the truth of anything asserted in such utterance" (352 F. 2d at p. 853). Applying this distinction to our case, literally not a single one of the above summarized hearsay declarations would be admissible under the reasoning of *Costello* itself. Indeed the *Costello* Court went on to note this Court's distinction in *Lutwak, supra*, between acts and declarations with respect to admissibility, and the *Costello* Court followed this immediately with a repetition of the principle that "Out-of-Court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule" (*ibid*). The nearest that *Costello* comes to any "verbal acts" idea or formulation is in the purely parenthetical reference at the top of p. 854 of 352

F. 2d, *viz.*, "Evidence of an act (*or a statement offered other than for its truth*) has no special evidentiary hurdle to overcome * * *" (emphasis supplied). But this latter parenthetical item is not further developed in the *Costello* opinion. In the opinion below the Court seems to consider that *Lutwak* and *Costello* are authority for the "verbal acts" doctrine which has here been applied against our petitioner. But we submit that a very great leap indeed is needed to connect those cases with the instant case. We submit that, in the following key "connecting" sentence on this subject in the opinion below, the reasoning of the Court of Appeals was assumptive, simplistic and illogical: "As indicated in our discussion of the single conspiracy issue, no preliminary showing is needed to allow the Jury's consideration of what others have done, including 'verbal acts', insofar as such acts show the conspiracy's existence and scope and the consequent likelihood of any defendant's being a part of it". If this last-quoted formulation is a correct statement of the law, then, as we previously suggested, it is difficult to conceive of any conspiracy hearsay which would not serve as a "verbal act" to "show the conspiracy's existence and scope and the consequent likelihood of any defendant's being a part of it".

(5) This amorphous "verbal acts" rule which has evidently been invented by the Court below in this case has been moreover endowed by the Court below with an additional potency which, from the standpoint of a defendant in a conspiracy prosecution, may aptly be described as "whiplash". We refer to the circumstance above mentioned that the "verbal acts" device evidently introduced into the law by the opinion below is combined in that opinion with a rule that it is for the Trial Judge, not for the Jury, to

decide whether there is sufficient independent evidence to link a particular defendant into knowing conspiracy membership, as a prerequisite to letting the Jury consider conspiracy hearsay against such defendant. The "verbal acts" idea is bad enough, in the bootstrap-levitational form proposed by the Court below, whereby practically all and any conspiracy hearsay becomes metamorphosed into a "verbal act" to which the hearsay rule need no longer apply. But when this is combined with the idea that the Trial Judge, acting alone without the Jury, is allowed (indeed apparently required) to decide the cardinal and threshhold issue of a particular defendant's knowing participation in the conspiracy on the basis of independent proof thereof (i.e., proof not dependent upon the acts or declarations of co-conspirators), a really rather astounding (and very frightening) alteration is effected in the law of federal criminal conspiracy. For, what results from this combination of ingenious propositions is that a conspiracy defendant not only faces the prospect of being unceremoniously hustled into a non-jury finding of membership in the conspiracy, but also he faces a downgrading by the Trial Judge of the seriousness of the Judge's own responsibility in properly arriving at such a finding of membership because, under the "verbal acts" phase of the "whiplash" process here involved, there must inevitably be at least a strong inclination on the part of the Trial Judge to minimize altogether the importance of the problem of possibly of prejudicial hearsay inasmuch as, under the "verbal acts" approach, there is not really going to be much of a problem of conspiracy hearsay anyhow.

(6) Thus, under the evidently novel doctrines of the opinion below, defendants in Federal conspiracy prosecu-

tions face a drastic new form of *pro tanto* directed verdicts of guilty—on the all-important issue of each defendant's knowingly have become *vel non* a member of the conspiracy with knowledge of its purposes; and this directed verdict procedure would furthermore be in most if not in all cases practically a matter of judicial routine, or of but minorly-hesitant judicial formality, in view of the added factor that one prime consequence of the nonjury finding of conspiratorial membership—the consequent admissibility of conspiracy hearsay proofs against the particular defendant—would so largely lose its significance (and its deterrent effect on the mind of the Trial Judge) through the practical obliteration of the traditionally important protection against conspiracy hearsay, i.e., through the practical obliteration of any distinction between "declarations" and "acts" *via* the new doctrine of "verbal acts".

(7) A further word is in order as to the portion of the reasoning in the opinion below which favors making it the exclusive province of the Trial Judge to decide the vital issue of conspiracy membership on the part of a particular defendant. Let us examine briefly the authorities cited by the Court below for this proposal. First, the Court below cites Judge Learned Hand's opinion in *United States* v. *Dennis*, 183 F. 2d 201, 230-231 (C.A. 2 1950), affirmed 341 U.S. 494. But in another of the authorities cited in this portion of the opinion below, namely, *United States* v. *Costello*, 352 F. 2d 848, 853 (C.A. 2 1965), it is expressly noted that the portion of Judge Learned Hand's opinion in *Dennis* to which reference is had was *dictum* (352 F. 2d at p. 853, fn. 2); indeed the *Costello* decision expressly notes also that the Trial Judge in the *Dennis* case had charged that the Jury must itself resolve the "preliminary" ques-

tions of conspiracy and participation beyond a reasonable doubt (*ibid.*). The Court below also cites *United States* v. *Pugliese,* 153 F. 2d 497, 500-501 (C.A. 2 1945), in support of letting the Trial Judge resolve such "preliminary" conspiracy questions. *Pugliese* was also written by Judge Learned Hand. *Pugliese* was not a conspiracy case, but the Court of Appeals treated the "hearsay" problem in terms of a theory of agency as between the participants in the substantive crime charged. The defendant Pugliese's wife had made declarations to a policeman which were susceptible of being construed as inculpating her husband. Although the wife was later acquitted by the Jury, the Court of Appeals ruled that the admissibility of her declarations was for the Judge, on the theory that the only thing the Judge had to decide was whether, if the Jury chose to believe the witnesses, Pugliese and his wife were engaged in a joint undertaking. The further reasoning of the Court of Appeals in the *Pugliese* case makes it clear that, in the circumstances there presented, the Court deemed that the wife's declarations partook of a guilty effort to divert suspicion from herself and her husband. As such, the declarations of the wife would obviously and *par excellence* become in and of themselves proof of criminal partnership or joint enterprise (if not of conspiracy). No such factors or reasoning are applicable in our case. The Court below also cited, for the branch of its reasoning here under discussion, *United States* v. *Stadter,* 336 F. 2d 326, 329-330 (C.A. 2 1964), cert. denied 380 U.S. 945. There is at least a very serious doubt whether *Stadter* is in point at all, because there the contention to which the Court was addressing itself was "that the Jury must first find from the independent evidence that a conspiracy

existed *and* that the defendants were members of it before considering the hearsay" (emphasis supplied); whereas our contention here is that the subject for which independent evidence is needed (and a jury instruction thereon) is each individual defendant's joining *vel non* of the conspiracy. In other words, in *Stadter* the unsuccessful contention of the appellants was that even the very existence of the conspiracy itself must be proved by "independent" evidence, and we do not necessarily dispute the rejection of *that* possibly excessive contention in *Stadter*. As a matter of fact, *Stadter* recognized the correctness of the point for which we are here contending ("It is settled that there must be independent evidence establishing a defendant's participation in a conspiracy if declarations of a co-conspirator made pursuant to and in furtherance of the conspiracy are to be used against that defendant."—336 F. 2d at p. 329).

The Court below has also cited, on the point here being discussed, *United States* v. *Borelli*, 336 F. 2d 376, 387 (C.A. 2 1964), cert. denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960. The portion of the *Borelli* decision to which the Court below here refers (336 F. 2d at p. 387) does contain a tangential suggestion that the Trial Judge may deal with conspiracy evidence from the standpoint of whether it is "enough to meet the threshhold requirement of showing the likelihood of an association between [alleged conspirators A and B] and thus to render admissible the latter's statement confirming the association." But we would respectfully note that, intending no disparagement of the distinguished judicial scholarship of the writer of the opinion below herein, the *Borelli* decision (as also the *Costello* decision, *supra*) was written by the same Judge

who wrote the decision below, and *Borelli, Costello* and the opinion below appear to rely primarily on the same earlier authorities, notably the opinions written by Judge Learned Hand in *Pugliese* and *Dennis, supra.* Finally, the opinion below also cites (in fn. 3) *Carbo* v. *United States,* 314 F. 2d 718, 735-738 (C.A. 9 1963), cert. denied 377 U.S. 953. The discussion of the problem in *Carbo*—the problem of whether Judge or Jury should resolve the "preliminary" issue of conspiracy membership on independent proof—is based primarily on, again, the *Dennis* case, *supra,* and we respectfully submit that the *Carbo* discussion is not profoundly contributive. The Court in *Carbo* seemed to care more about the "policy" or "value" of the exception to the hearsay rule which allows conspiracy hearsay once the facts of conspiracy and of individual membership are proved, than it cared about what one would think to be the incomparably more important "policy" or "value" problem of the proper distribution of functions as between Court and Jury with a view to avoiding even a minimal *pro tanto* system of directed verdicts of guilty in federal criminal cases.

(8) Decisions like *Carbo* in the Ninth Circuit, or like *Pugliese* and *Dennis* in the Second Circuit where the revered Judge Learned Hand spoke on the subject here in question, and indeed a decision like the one here sought to be reviewed where the opinion was written by a Judge whose abilities are already legendary and revered in his own lifetime, are not to be taken lightly even though they are decisions which seem to the mind of the conventional criminal lawyer to be undesirably disruptive of the accustomed pathways of the Federal criminal law which have

tended to make possible a fairer administration of the otherwise dire indeed devices of the Federal law of conspiracy. When Judges of the deservedly monumental prestige of a Judge Learned Hand or a Judge Henry J. Friendly counsel a departure from accustomed modes of proof or procedure in criminal litigative procedures against the interests of defendants, it would be ill-behooving for any defense lawyer to try to minimize the revered authority against which he presumes to pit himself in an application for ultimate review by this High Court. We, counsel for petitioners in the present certiorari application, are scarcely able to express the sense of hesitation which we feel in asking this Court to do what we think needs to be done in this case, that is, to restore the Federal law of conspiracy proof to its proper due process arrangement and posture, from the displacement which we respectfully are convinced has been brought about by decisions like that of the Court below in the present case in reliance upon a prior case law evolution of such prestigious quality. While the present case of our three petitioners happens to involve individual defendants and specific criminal charges falling within categories around which the utmost energies of Governmental and popular execration explode in this era of anti-narcotics policy, or perhaps precisely because this is intrinsically so "offensive" a case on its alleged and jury-convicted facts, we feel not only entitled but obligated (as defense counsel) to call upon this Court to redress what appears to us to be a grievance of due process and fair trial that endangers the entire fabric of Federal law enforcement in the field of conspiracy prosecution.

(8) Finally, we point out that the Trial Court in the present case did not even undertake the function which the Court of Appeals suggested a Trial Judge should properly carry out in situations of this type; that is, the Trial Judge in our case did not even carry out or undertake, so far as the record shows, a nonjury determination of the issue of the alleged conspiratorial membership of each individual defendant. We have reserved until the end of our discussion under this observation as to the abstention of the Trial Judge from making any such determination, because we have respectfully wanted to give special emphasis to this omission of the Trial Judge as affording perhaps the best, single, clearest insight into the slippage of Federal criminal trial justice that has taken place in this case as regards the crucial issue of adequate proof (and adequate jury instructions thereon) of individual conspiracy membership.

CONCLUSION

It is respectfully submitted that this joint petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners

ABRAHAM GLASSER
Of Counsel

APPENDIX 1

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 209—September Term, 1966.

(Argued November 30, 1966 Decided January 5, 1967.)

Docket No. 30656

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN NUCCIO, ROSARIO LUPO, and WILLIAM CURCURATO,

Defendants-Appellants.

Before:

MEDINA, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York, Leo F. Rayfiel, *Judge,* convicting appellants after a verdict on a single count indictment for conspiracy to import heroin in violation of 21 U. S. C. §174. Affirmed.

JEROME LEWIS, Brooklyn, N. Y., for *defendants-appellants.*

JEROME C. DITORE (Joseph P. Hoey, United States Attorney, Eastern District of New York), *for appellee.*

FRIENDLY, *Circuit Judge*:

A grand jury in the District Court for the Eastern District of New York returned a one-count indictment charging the three appellants, John Nuccio, Rosario Lupo and William Curcurato, of conspiring with Rose Carluccio, whose trial was later severed, and with Georges Henrypierre and Henri LaPorterie to import heroin into the United States contrary to law in violation of 21 U. S. C. §174. After a short trial before Judge Rayfiel and a jury, all three defendants were found guilty and sentenced.

Henrypierre, an Air France steward for fourteen and a half years, was arrested at Kennedy International Airport in January, 1965, for carrying in his luggage a three kilogram package of heroin given him in Paris by Henri LaPorterie for delivery to Curcurato at the latter's apartment on 58th St. in Queens. As the Government's chief witness at the trial, he testified he had made approximately ten such deliveries to Curcurato, first at an apartment on 45th St. in Queens to which LaPorterie had given him a key, and later at the 58th St. apartments to which Curcurato had given him keys. On two occasions in 1963 Curcurato gave him money to take back to Paris. LaPorterie's direction was that after delivering narcotics to specified addresses

in Brooklyn or Queens, Henrypierre was to call a New Jersey telephone number. This belonged to Rose Carluccio, who testified she had standing instructions from Nuccio to say that he would meet the caller the next day "in the same place." The rendezvous was the C. B. S. building on 7th Avenue in Manhattan. On some fifteen to twenty occasions, four or five of which Mrs. Carluccio corroborated, this procedure resulted in Nuccio's handing Henrypierre packages of money, from $20,000 to $70,000, which the steward would then deliver to LaPorterie in Paris. Nuccio would ask about the latter's health, send greetings and inquire whether Henrypierre had been in Brooklyn or Queens. Lupo was the Brooklynite; Henrypierre testified to three or four deliveries to Lupo's apartment. On one such occasion, when he found Lupo sitting in a car outside the building, they drove off and picked up Nuccio; Henrypierre left the narcotics in the car with the two, who jointly sought news of LaPorterie's well-being. Henrypierre was compensated by LaPorterie for his services at the rate of $100 per kilo and at times the defendants also paid him $100 for taking money back to France. The Government adduced some evidence corroborating the testimony of Henrypierre and Mrs. Carluccio, although none of it directly showed criminality. Curcurato testified, admitting that Henrypierre had come to his two apartments in Queens but asserting that this was for gambling rather than delivery of narcotics. Nuccio and Lupo offered no evidence.

The only challenge to sufficiency of the evidence is the rather standard claim that the proof showed two conspiracies—in this instance one involving the two Frenchmen

with Nuccio and Lupo and the other solely with Curcurato —rather than the single conspiracy which the judge told the jury it must find in order to convict. The challenge fails. Nuccio's inquiries about deliveries in Brooklyn and Queens constituted evidence linking all three defendants. Regarded as verbal acts in furtherance of the conspiracy—reminders by Nuccio to Henrypierre that his job required him to make deliveries in Brooklyn and Queens and admonitions to go there if he had not yet done so—rather than as mere testimonial declarations—"I have colleagues in Brooklyn and Queens"—they were admissible against all the defendants even without other proof of common action. *Lutwak* v. *United States,* 344 U. S. 604, 617-19 (1953); *United States* v. *Costello,* 352 F. 2d 848, 853-54 (2 Cir. 1965), cert. granted as to another point, 383 U. S. 942 (1966). Whether or not these inquiries and the proof of deliveries to Lupo and Curcurato in Brooklyn and Queens would alone have been enough to prove a single conspiracy, the addition of the evidence that LaPorterie, who was known to all the defendants, had designated Nuccio as paymaster in chief, sufficed to link both Curcurato and Lupo in the overall operation. As Judge Hincks said in *United States* v. *Stromberg,* 268 F. 2d 256, 264 (2 Cir.), cert. denied, 361 U. S. 863 (1959), "from such evidence it might rationally be inferred that one joining such a conspiracy knew that it had a scope and that, for its successful operation, it required a wide-spread organization, more comprehensive than may have been disclosed by any contact or transaction of which he had knowledge through his actual personal participation." See also *United States* v. *Borelli,* 336 F. 2d 376, 382-84 (2 Cir. 1964), cert. denied sub nom. *Cinquegrano* v.

United States, 379 U. S. 960 (1965). We therefore turn to the claims of errors in the course of the trial and in the charge.

The first of these was the court's refusal to allow Henrypierre to be cross-examined as to homosexual advances to Curcurato allegedly made and repulsed. While it would indeed have been wrong to permit cross-examination on the score of homosexuality merely to discredit Henrypierre's character, *United States* v. *Provoo,* 215 F. 2d 531, 535-37 (2 Cir. 1954), the narrower proposal to interrogate concerning repulsed homosexual advances to one of the defendants went to the witness' bias and motive, and should have been allowed. *Tla-Koo-Yel-Lee* v. *United States,* 167 U. S. 274 (1897); *United States* v. *Masino,* 275 F. 2d 129, 132 (2 Cir. 1960); *United States* v. *Barash,* 365 F. 2d 395, 400-01 (2 Cir. 1966); McCormick, Evidence 83 (1954); 3 Wigmore, Evidence §950 (1940 ed.). However, Curcurato testified in considerable detail to the homosexual attempt and Henrypierre's threat to "get" him because he repelled it; also Henrypierre was called in rebuttal and denied the episode, and Curcurato's counsel cross-examined in an unsuccessful effort to show that the denial was contrived. There is no reason to suppose that cross-examination immediately after Henrypierre's testimony in chief would have produced answers on his part more favorable to the defense. Neither do we find sufficient basis for reversal in Curcurato's contention that he should have been permitted to ask Henrypierre whether he was a homosexual on the theory that an affirmative answer would have lent credence to the defendant's version of the facts. Admission by Henrypierre of some homosexual tendency would have

gone only a small way toward proving that he approached Curcurato and that his approach was violently repelled. Weighed against the rather slight probative value, the adverse effect of such evidence in improperly discrediting and embarrassing the witness justified the trial court in excluding it. See 3 Wigmore, Evidence §951 (1940 ed.).

The judge's refusal to charge that allegedly inconsistent testimony by Henrypierre in the trial of other defendants for a narcotics offense in the Southern District of New York should be considered as affirmative evidence and not merely as affecting credibility is contended to run counter to our decisions in *United States* v. *DeSisto*, 329 F. 2d 929, cert. denied, 377 U. S. 979 (1964), and *United States* v. *Borelli, supra*, 336 F. 2d at 391 & n. 11. After eliminating instances where no inconsistency existed, the argument comes down to this: Henrypierre testified at the instant trial that over the years he had delivered narcotics to four people whereas in the Southern District he had given the number as two, one being Charles Hedges and the other having an appearance different from any of the defendants; and whereas at this trial he testified to deliveries to Curcurato and Lupo in 1964, he said in the Southern District that in that year he had made deliveries to only one person, presumably either Hedges or the other man mentioned above.[1] His explanation of the apparent dis-

[1] Henrypierre was also taxed with an inconsistency between his testimony at trial and that before a grand jury in the Eastern District: Whereas he stated at the trial that his deliveries to Curcurato's 45th St. apartment began in the spring of 1963, he had told the grand jury that his first delivery was in the fall, whether of 1962 or 1963 he could not remember. Defense counsel made no request that the judge charge that this grand jury testimony should be accepted as affirmative evidence, doubtless for the excellent reason that either version was equally damaging.

crepancy was that his testimony in the Southern District was directed only to the group and the events he thought were involved in that trial.

Although counsel refers to *DeSisto* and *Borelli* as if they enunciated the same principle, this is not at all the case. In *Borelli* we merely adhered to the established doctrine that when a witness specifically reaffirms the truth of something he had said elsewhere, the earlier statement constitutes evidence as fully as what he says on the stand. Citing many cases, we pointed out that "This principle long antedates and is quite different from our decision in United States v. DeSisto. . . ." See also *United States* v. *Persico*, 349 F. 2d 6, 12 (2 Cir. 1965). However, a witness scarcely reaffirms the truth of a prior statement within the meaning of this rule when he says that, although the statement was true, it was not directed to facts now at issue. The rule, for example, would not require equating the affirmation of a previous statement that the witness had never seen John Doe with trial testimony that he had, if the former statement related to an earlier period.

DeSisto dealt with the harder problem where a witness called to establish a fact in the proponent's case denies the fact or knowledge of it although, as the proponent then proves, he had testified to it before a grand jury or at a former trial concerned with the self-same issue. We sustained the trial court's refusal to instruct in such a case that the former testimony could be considered only as impeaching the witness' current denial of the fact or of knowledge and not as affirmative evidence. Where the proponent thus impeaches his own witness on the basis of

prior inconsistent statements, he will not have sustained his burden unless the trier takes the next steps of believing the fact to be the opposite of what the witness testified, cf. *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (2 Cir. 1952), and, particularly when the witness now professes to have no knowledge at all, of considering it to be what he had previously said. We thought that when the prior statements took the form of testimony to a grand jury or at a former trial on the very matter *sub judice*, the likelihood of a jury's short-cutting this process was so overwhelming that it was best to conform the instruction to the realities rather than confuse the jury by telling it to perform an impossible task, the opponent being adequately safeguarded by the circumstances under which the former testimony was given and the opportunity for immediate cross-examination. Compare *United States* v. *Schwartz*, 252 F. Supp. 866 (E. D. Pa. 1966).

The problem, here presented, where the witness testifies to a fact useful to the proponent which a cross-examiner claims he had previously denied, is rather different. In such a case the "orthodox" rule that "Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value*," 3 Wigmore, Evidence §1018 at 688 (3d ed. 1940), does not place the judge in the unworthy position of telling the jury to do the opposite of what he expects it will; it is quite possible for the jury to discredit the witness simply because of "the repugnancy of his evidence," 3 Wigmore, *supra*, at 686-87, quoting Chief Baron Gilbert, and thus to regard him as an unreliable fellow, without deciding that the earlier statement was the true one. In such cases the opponent accomplishes

a large part of his objective, and often—particularly in criminal cases—all of it,[2] if the self-contradiction destroys the testimony, without the further step of converting the proponent's witness into his own by having the jury accept the earlier statement as the truth despite the later contradiction. While we do not say that the *DeSisto* principle could never be invoked in such a case, compare *United States ex rel. Ng Kee Wong* v. *Corsi,* 65 F. 2d 564 (2 Cir. 1933), we would be loath to disturb a trial judge's refusal to do so. Moreover, and even more important, the earlier testimony here in question, unlike that in *DeSisto;* was not given at a former trial in the same case where the witness' mind was focused on the identical facts at issue in the later one. Although testimony at the trial of another case can properly be used for impeachment subject to such explanation as the witness may make, where the prior testimony was given in a different case with different parties involving different issues, a trial judge may properly consider the dangers to be too great to warrant the admission of the testimony as affirmative evidence. For that reason, as well as the lack of showing of prejudice, see fn. 2, we are unpersuaded by appellants' argument.

While the judge correctly charged that the Government must prove as to each defendant that he "knowingly and wilfully joined the conspiracy during the period of its operation with the intent and the purpose of furthering its objective," he did not give further charges requested by defendants by which, in various ways, the jury would have

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[2] That was the situation here, since if Henrypierre's credibility was destroyed, almost nothing would remain of the prosecution's case.

been told that in determining a defendant's membership, it was "not to consider what others may have said or done" but was to decide "without regard to and independently of the statements and declarations of others." Although we do not doubt that such instructions have often been given, all the law requires is that the jury find, on the basis of all evidence properly admitted by the judge, a conspiracy and each defendant's purposeful entrance into it. As indicated in our discussion of the single conspiracy issue, no preliminary showing is needed to allow the jury's consideration of what others have *done*, including "verbal acts," insofar as such acts show the conspiracy's existence and scope and the consequent likelihood of any defendant's being a part of it. For example, if Henrypierre's luggage had contained packages marked by LaPorterie for each of the three defendants, no one could reasonably doubt that the jury might consider this against each defendant, although it would not alone be sufficient for a conviction. And while a declaration of one alleged conspirator in furtherance of the conspiracy otherwise banned by the hearsay rule is not admissible against another without other proof of the latter's membership, the established rule in this circuit is that determination of the adequacy of such proof is for the judge and, if he is satisfied on that score, he is to leave the declaration "to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent." *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (L. Hand, *J.*), aff'd,

341 U. S. 494 (1951).[3] Accord, *United States* v. *Pugliese*, 153 F. 2d 497, 500-01 (2 Cir. 1945); *United States* v. *Stadter*, 336 F. 2d 326, 329-30 (2 Cir. 1964), cert. denied, 380 U. S. 945 (1965); *United States* v. *Borelli, supra*, 336 F. 2d at 387. Without detracting from our reaffirmation of this position, we note that no hearsay declarations appear to have been offered here; the notion that evidentiary use of anything emerging from the mouth is banned unless it comes within an exception to the hearsay rule is as fallacious as it is durable. See *United States* v. *Costello, supra*, 32 F. 2d at 853.

After reading the indictment to the jury, the judge also read certain pertinent provisions of 21 U. S. C. §174. He told the jury that the section "provides that whenever a trial for a violation of this section takes place the defendant is shown to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury"; that this "presumption" does not "relieve the Government of its obligation to prove every material element of this case beyond a reasonable doubt"; that if the jury believed Curcurato's testimony that he never had possession, "he doesn't owe any explanation"; and that the jury was to draw no inferences

---

[3] Judge Hand in *Dennis, supra*, 183 F. 2d at 231, made clear he was fully aware that "this conclusion permits the jury to act upon hearsay, because they may be satisfied of the 'joint undertaking' only because of the declaration." But he was satisfied, as are we, that "it often happens that hearsay is competent, and this is the only practicable way to deal with the question." See the helpful discussion by Judge Merrill in *Carbo v. United States*, 314 F. 2d 718, 735-38 (9 Cir. 1963), cert. denied, 377 U. S. 953 (1964).

from the failure of Nuccio and Lupo to testify. While this did not follow what the Supreme Court and this court have characterized as the "better practice" of omitting explicit reference to the statute and simply telling the jury they may draw the inference from possession unless the evidence provides a satisfactory explanation, *United States* v. *Gainey*, 380 U. S. 63, 71 n. 7 (1964); *United States* v. *Armone*, 363 F. 2d 385, 392-93 (2 Cir.), cert. denied, —— U. S. —— (1966), it would be hypercritical to fault the judge on that account in this case. The importance of the inference permitted by the statute is in relieving the Government of what would otherwise be the necessity of coming forward with evidence of knowledge of illegal importation in every case. The present was the somewhat unusual case where, as to all defendants, the Government's proof had covered precisely that. If the jury believed Henrypierre, the defendants knew they were conspiring to deal in illegally imported narcotics; if it didn't, there was no substantial evidence that they had conspired to deal in anything. With the bearing of this section of the statute so minimal, it would be absurd to reverse for a slight lapse from perfection in the instruction.[4]

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[4] While the only package the Government was able to subject to analysis did not come into the physical possession of any of the defendants, we adhere to our holdings in *United States* v. *Agueci*, 310 F. 2d 817, 828-29 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), that no proof of actual dealings in narcotics is required to establish conspiracy to violate the narcotics laws and that when such proof is required, as in the case of a substantive count or in order to give rise to the statutory inference from possession, "just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence" —such as Henrypierre's admissions, the devious methods used, and the amount of money passed. Insofar as *Cook* v. *United States*, 362 F. 2d 548 (9 Cir. 1966), may be to the contrary, we do not agree with it.

Appellants' complaint, not made at the trial, that the judge did not "marshal" the evidence, is frivolous. Any fair summary of the evidence could only have hurt them unless, perhaps, the judge were to have made an error that would have provided a ground for appeal. Appellants rely on *United States* v. *Kelly*, 349 F. 2d 720, 757 (2 Cir.), cert. denied, 384 U. S. 947 (1966), but this simple case is about as far as can be imagined from that complicated nine months trial on an indictment containing 160 counts and naming 20 defendants and 28 co-conspirators. Compare *United States* v. *Kahaner*, 317 F. 2d 459, 479-80 n. 12 (2 Cir.), cert. denied, 375 U. S. 835-36 (1963); *United States* v. *Armone, supra*, 363 F. 2d at 404. We likewise find no merit in the claim that we should reverse because of the charge on reasonable doubt. After saying that a definition "as a doubt for which you can give a good reason" was "begging the question," and then making other remarks which are not criticized, the judge defined a reasonable doubt as one "which you entertain in your mind after a careful consideration of all the evidence in the case which in your opinion would cause a prudent and reasonable and careful person to act in a manner which would be important to himself or herself." This is attacked as departing from our language in *United States* v. *Johnson*, 343 F. 2d 5, 6 (2 Cir. 1965), "such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves." While the "hesitate" language makes the point considerably better and we wish trial judges would use it, we find it impossible to believe, in the absence of any evidence such as a request for further instructions, that jurors would retain such a nuance in their minds and be significantly influenced by it.

Affirmed.

APPENDIX 2

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOT THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January one thousand nine hundred and sixty-seven.

Present:

HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN NUCCIO, a/k/a LOUIE, ROSARIO LUPO, a/k/a JOE RUSSO, WILLIAM CURCURATO, a/k/a MIKE ROMA, a/k/a JOHN PETRI,

Defendants-Appellants,

ROSE D. CARLUCCIO,

Defendant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix 2—Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX 3

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

v.

JOHN NUCCIO, ROSARIO LUPO, and WILLIAM CURCURATO,

Defendants-Appellants.

Before Medina, Friendly and Smith, Circuit Judges.

Petition for rehearing etc.

Jerome Lewis, Brooklyn, N. Y.
for Appellants.

Petition for rehearing denied.

Motion for stay of mandate pending petition for certiorari and for continuation of bail granted on the terms and conditions provided in Rule 28(c) of the Rules of this Court.

H.R.M.
H.J.F.
J.J.S.
U.S.C. JJ.

25 January 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1190

JOHN NUCCIO, ROSARIO LUPO AND WILLIAM CURCURATO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. A joint petition for rehearing was denied on January 25, 1967. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including March 25, 1967, and the petition was filed on March 24, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

260-904—67

QUESTION PRESENTED

Whether the Court properly instructed the jury concerning the process by which they were to make a finding as to whether each petitioner knowingly participated in the alleged conspiracy.

STATEMENT

On May 2, 1966, petitioners were convicted by a jury in the United States District Court for the Eastern District of New York on a single-count indictment charging conspiracy to import heroin into the United States, in violation of 21 U.S.C. 174 (App. App. 7a–8a, 54a).[1] Petitioner Nuccio was sentenced to imprisonment for fifteen years and fined $10,000; petitioner Lupo to fifteen years and $5,000; and petitioner Curcurato to twelve years and $1,000 (R. 579). The court of appeals affirmed (Pet. App. A14–A15; App. App. 68a–79a).

1. The evidence at trial showed that on January 29, 1965, one Georges Henrypierre, an airline steward for Air France, was arrested at Kennedy International Airport for importing into the United States a quantity of heroin secreted in his luggage (R. 34–41, 44–45, 98, 423; Exh. 2, 3). He was to deliver this package of heroin (3.004 kilograms, 92% pure) to petitioner

[1] The record filed with the clerk of this Court includes appellants' appendix below (App. App.) and the trial transcript (R.). The trial transcript is made up of eleven separate volumes, of which volumes 1–7 and 10–11 have been paginated consecutively pages 1–579. Later, it was determined that volume 8 (relating to April 28, 1966), which pertains to instruction requests, was also pertinent to the appeal; therefore, that volume has been incorporated into the transcript at page 525, as pages 525a–525z, etc.

Curcurato at his apartment in Queens, New York (R. 46–47, 179–180, 416–417).

Henrypierre had been transporting narcotics from Paris, France to New York from the Spring of 1963 to the time of his arrest in January 1965. He was given the packages by one Henri LaPorterie in Paris (R. 39–41, 52, 63–66a; Exh. 3) with instructions to deliver them to certain addresses in Queens and in Brooklyn, and to contact petitioner Nuccio, by calling a New Jersey telephone number, to arrange for payment for the narcotics (R. 79–81). Henrypierre was paid $400 for each kilo of narcotics he delivered for LaPorterie (R. 89).

Henrypierre first met Curcurato in the Spring of 1963 at the latter's apartment on 45th Street in Queens (R. 48–54, 173), to which he had a key given to him by LaPorterie in Paris (R. 55). On several occasions, petitioner Curcurato was at the apartment and delivery of the narcotics was made directly to him (R. 53). In the fall of 1964, petitioner Curcurato informed Henrypierre that there would be a change of apartments and gave him keys for a new apartment on 58th Street, also in Queens (R. 56–58, 243). Henrypierre made some three or four deliveries of narcotics to the new apartment before his arrest in January 1965 (R. 58–62). On two occasions in 1963, petitioner Curcurato gave Henrypierre money to deliver to Paris (R. 89–90).

Other deliveries of narcotics—some three or four between 1963 and 1965—were made by Henrypierre to 680 81st Street, in Brooklyn (R. 67–70, 72). On the first such delivery, the narcotics were left with petitioner Lupo at this address (R. 69–73). On a

subsequent occasion, Henrypierre was met outside by petitioner Lupo. They drove off and picked up petitioner Nuccio. Both Lupo and Nuccio inquired about LaPorterie, and Henrypierre left the narcotics in the automobile with the two petitioners (R. 73–78).

Payment for the narcotics delivered to Queens and Brooklyn was generally accomplished independently of delivery, by reaching petitioner Nuccio through the New Jersey telephone number (R. 79–82). During 1963 and 1964, Henrypierre called this number some fifteen or twenty times, talked to a woman there, and met petitioner Nuccio by appointment in front of the C.B.S. building on Seventh Avenue in Manhattan (R. 82–85, 324–335). At each of these fifteen or twenty meetings, petitioner Nuccio gave Henrypierre a package of money varying in amounts from $20,000 to $70,000, which Henrypierre later delivered to LaPorterie in Paris (R. 85–90, 335–342, 426). On occasion, petitioner Nuccio would inquire about LaPorterie in Paris and question Henrypierre as to whether he had been out to Brooklyn or Queens (R. 86–87).

Shortly after Henrypierre's arrest in January 1965, the Queens and Brooklyn apartments were vacated by petitioners Curcurato and Lupo, respectively (R. 204–205, 391–392).

2. Petitioners and the government, in varying language, requested the trial judge to instruct the jury that it must find from independent proof that each defendant had been a member of the conspiracy before considering hearsay declarations of alleged co-conspirators against him (R. 525n, 525s, 602–603,

631–635). The judge indicated that he would cover the substance of these requested (R. 517, 525b–525c), but did not do so; instead, he gave the instructions set out in the petition for a writ of certiorari (Pet. 10–12).[2] After the major portion of the instructions were given, including the part concerning proof of a conspiracy, the judge excused the jury and called a recess "for the purpose of giving [counsel] an opportunity to direct my attention to any instruction which you think I overlooked, particularly those which I indicated I would grant and overlooked. * * * [Y]ou are at liberty to take the exceptions now. More importantly to tell me what you think I may have overlooked, which I indicated I would grant" (R. 549–550). Counsel did not bring to the judge's attention any omissions in the charge relevant to the instruction complained of here.

ARGUMENT

Petitioners' sole contention is that the trial judge committed reversible error in not expressly instructing the jurors that, before considering hearsay declarations of other conspirators against a particular defendant, they must determine from independent proof of such defendant's own acts or declarations that he

[2] Petitioners' quotation does not include the following part of the charge (R. 548–549):

> A little while ago I said to you that while you are considering a particular defendant—and that brings to mind the fact that there are three defendants here, each of whom must be treated separately in your deliberations—you take each defendant in turn as you see fit; consider all of the evidence in the case and make your determination as to his guilt or innocence.

had in fact become a member of the alleged conspiracy (Pet. 2–3, 12–16, 22–29). Such an instruction is commonly given in conspiracy cases, although decisions have held that the adequacy of the proof *aliunde* to connect individual defendants to the conspiracy is for the trial judge and that, if he is satisfied, he should leave the declarations to the jury to consider like any other evidence, instead of instructing the jury first to find by independent evidence that a particular defendant was a member of the conspiracy. See, *e.g.*, *United States* v. *Stadter*, 336 F. 2d 326, 329 (C.A. 2), certiorari denied, 380 U.S. 945; *Carbo* v. *United States*, 314 F. 2d 718, 735–738 (C.A. 9), certiorari denied, 377 U.S. 953. However, it is not, in our view, necessary to go that far to uphold the convictions in this case.

Whatever the rule in a case where hearsay declarations by co-conspirators are an important part of the proof as to a particular defendant, such is not the situation here. As the court below pointed out, the testimony in this case of what Henrypierre did in making the various deliveries—meeting the defendants, collecting money, etc.—were acts illuminating the nature of the conspiracy and as such admissible against all the defendants. *Lutwak* v. *United States*, 344 U.S. 604, 617–619. That was the major part of the proof in this case. Moreover, declarations which were an essential part of the acts proved, such as Nuccio's question as to whether Henrypierre had been in Brooklyn or Queens at the time he paid for narcotics (R. 86–87), were admissible against all defend-

ants as verbal acts[3] showing the nature of the conspiracy. To the extent that there were any declarations at all by one conspirator which could be said to be hearsay and which might have been considered against the others without independent proof of the conspiracy—possibly, for example, Nuccio's statement of regards to LaPorterie—they were so minimal as to be insignificant. In the circumstances of this case—where almost all the evidence, including the declarations which constituted verbal acts, were properly admissible in showing the nature of the conspiracy—the common instruction as to the necessity of proof *aluinde* would have been meaningless and might well have been confusing. It would serve no purpose to tell a jury that it could consider all the acts and declarations against all defendants in determining the nature of the conspiracy, but that it could not consider the same declarations against non-declarants until it found the non-declarant to be a member of the conspiracy. Here the proof abundantly showed independent acts—not declarations—by each

[3] Contrary to petitioners' assertion (Pet. 17–22), there is nothing novel about the concept of "verbal acts". A verbal act is an utterance made contemporaneously with a non-verbal act (such as delivery of money), evidence as to which is independently admissible, which throws light on the non-verbal act. See *Beaver* v. *Taylor*, 1 Wall. 637, 642; *United States* v. *Costello*, 352 F. 2d 848, 854 (C.A. 2), certiorari granted on a different issue, 383 U.S. 942; *United States* v. *Markis*, 352 F. 2d 860, 863–864 (C.A. 2), petition for certiorari pending, No. 43, 1966 Term; *United States* v. *Ross*, 321 F. 2d 61, 68–69 (C.A. 2), certiorari denied, 375 U.S. 894; *Wilson* v. *United States*, 313 F. 2d 317, 318 (C.A. 9), certiorari denied, 374 U.S. 848; *United States* v. *Annunziato*, 293 F. 2d 373, 376–377 (C.A. 2), certiorari denied, 368 U.S. 919; *Aikens* v. *United States*, 282 F. 2d 53, 57 (C.A. 10).

petitioner manifesting both the nature of the conspiracy and the connection of each petitioner thereto. Thus, no prejudice whatever resulted, and there is no occasion for further review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FRED M. VINSON, JR.,
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PAUL C. SUMMITT,
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APRIL 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

FILED
JUN 9 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1190

JOHN NUCCIO, ROSARIO LUPO and
WILLIAM CURCURATO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

JOINT PETITION FOR REHEARING OF ORDER DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—against—

UNITED STATES OF AMERICA.

JOINT PETITION FOR REHEARING OF ORDER DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioners jointly pray for a rehearing of the order of this Court, made May 15, 1967, which denied their joint petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case January 5, 1967.

As stated in the certificate of counsel, *infra*, this petition for rehearing is believed to be justified by substantial grounds available to petitioners although not previously presented (Rule 58(2)).

Preliminarily summarizing those grounds: This Federal narcotics prosecution (21 U.S.C. §174), a single-count conspiracy prosecution, is believed to be unusual in that it charges simply and exclusively a conspiracy to *import* heroin, i.e., as distinct from the more common conspiracy

indictments in this area which ordinarily charge conspiracy not only to *import*, but also to *receive, conceal, sell*, etc. Since the indictment thus charges a *single, importation* conspiracy, proof beyond a reasonable doubt as to each of the within petitioners (defendants) was of course required *in those explicit importation terms of this conspiracy indictment.* When attention is focused upon this strictly importation character of the indictment, certain trial errors which we urged in the Court of Appeals—but which we unfortunately omitted from our petition for certiorari out of fear of writing too lengthy a petition—emerge as substantial, we believe.

The errors which thus emerge are: (1) The Jury should not have been instructed at all concerning the presumption of knowledge of illegal importation (21 U.S.C. §174), because the statutory presumption is simply not applicable at all in a strictly importation prosecution as such, and *a fortiori* it is not applicable in an importation-*conspiracy* prosecution; in such strictly importation cases what must be proved, without aid from any "presumption", is that each defendant did knowingly import (or, as here, conspire to import) contrary to law. (2) Since there was no proof with respect to any of our three defendants of either actual or constructive possession *of any substance actually proved to have been a narcotic drug,* the erroneous invocation of the statutory presumption was the more fatally aggrieving.

We turn now to a more detailed presentation of the points above suggested.

For convenience in making the more detailed presentation which now follows, it seems useful to formulate, in

the terms of an additional "Question Presented" in this certiorari proceeding, the following:

> [Additional proposed "Question Presented" for the purposes of this petition for rehearing]
>
> Since the case involved solely a charge of conspiracy to import narcotics, in which the Government had the burden to prove actual conspiratorial knowledge of importation, were not the petitioners denied a fair trial and due process of law by the instructions which permitted the Jury to apply the statutory presumption of knowledge of importation under 21 U.S.C. §174? Was not the prejudicial effect of such incongruous invocation of the statutory presumption made even worse by the undisputed fact that there was not even in this record any proof of possession by any defendant of a substance proved to have been narcotics? And was not the prejudice still further aggravated by the Trial Court's violation of the standards of *United States* v. *Gainey*, 380 U.S. 63, that it is "the better practice" in instructing jurors concerning this type of statutory presumption, to omit "any explicit reference to the statute itself in the charge"?

The trial proceedings which pertain to the above herein newly suggested issues are:

It will be recalled that the main prosecution witness, the French Airlines employee Henrypierre (R. 31 *et seq.*), was arrested by Customs Agents on January 29, 1965 at Kennedy Airport in New York City, while he was carrying a package concealed in his hand baggage which he said he was taking to the petitioner Curcurato, and this package contained three kilograms of heroin (R. 35-40, 44; pet. cert., Appendix 1, p. A2). It is undisputed that this package seized from Henrypierre at Kennedy Airport was not

connected up with any of the defendants, except through Henrypierre's statement that the package was intended for Curcurato. It was not, then, this package seized from Henrypierre at the New York Airport in January 1965 on which the prosecution depended for conviction of the defendants in this case, but it was the alleged prior deliveries of alleged packages of heroin which formed the basis of the prosecution's case. It is therefore important to note that the only testimony which in any way went to "prove" the alleged narcotics character of the prior packages was Henrypierre's testimony that, as compared with the package seized at Kennedy Airport, the prior packages were smaller, were wrapped in plastic and contained a white powder (R. 63-67).

Over defense objection that the package seized from Henrypierre when he was arrested at Kennedy Airport on January 29, 1965 had not been connected with any defendant, the Trial Court received that package as an exhibit in evidence subject to connection (R. 98-100).

At appropriate stages in the trial the defendants made objections or motions as follows: The admission in evidence of the package seized from Henrypierre at Kennedy airport on January 29, 1965 was objected to on the ground that the exhibit was not binding upon the defendants (R. 419-423); this point was further urged in a motion for acquittal on the ground that the Government must prove, as a material element, knowledge of importation of the narcotics; that since there was no proof of such knowledge, the Government must rely upon the statutory presumption based on possession of narcotics, and that the Government had failed to prove any such possession

because Henrypierre had testified merely that he delivered packages containing a white powder but there was no proof that it was narcotics (R. 447-448). At the completion of all of the proofs, renewed defense motions included the following (R. 511 *et seq.*). The Government had the burden of proving that each defendant had knowledge of the existence of the conspiracy, participated in the conspiracy, had a stake in the outcome of the conspiracy, and had knowledge of unlawful importation of narotics (R. 511). There was no proof of possession of narcotics because the white powder involved had not been proved to have been narcotics as of the time when Henrypierre allegedly made the deliveries (R. 511-512). It was pointed out that generally in cases of this type there is either proof of some conversation indicating that narcotics are involved, or there is proof of tests being made by the conspirators, whereas in this case there was nothing except speculation and surmise to show that the white powder was narcotics (R. 512).

Against the above trial background must be evaluated, we now submit, the fact that the Trial Judge saw fit to read to the Jury the statutory presumption provisions of 21 U.S.C. §174 (37a-38a), expressly advising the Jury that he was reading from the statute (*ibid*). We respectfully contend that it was prejudicial error to read to the Jury this statutory language, even if the case were one in which the presumption applied at all. *United States* v. *Gainey*, 380 U.S. 63. But, further, the statutory presumption could not be applied at all, either in logic or in due process fairness, to this case, because, as above urged, what the Government was required to prove in this prosecution under an indict-

ment expressly and solely charging an *importation* conspiracy, was that each defendant did so *conspire to import*. True, the Government contends that it met this burden of proof through the testimony of Henrypierre, and both of the Courts below evidently agree with the Government as to that. Nevertheless it was wrong to allow the Government to have the additional "proof", of a purely statutorily presumptive nature, to buttress as it were the alleged proof of conspiratorial importation as such. This gave the Government an unconstitutional extra advantage in building its overall corpus of "proof" in this trial. The issue of the defendants' guilt or innocence should have turned exclusively on the question of whether the Jury believed Henrypierre's testimony of an importation conspiracy; the issue should not have been additionally and improperly weighted in the Government's favor by dragging in the statutory presumption of knowledge of importation which, we repeat, had no conceivable proper applicability in this case because, again, the Government's case had to stand or fall on the adequacy of its proof of the alleged conspiracy to import, a topic to which the statutory presumption which Congress designed for cases of "possession", etc. could have no application. All of this was made even worse, in due process terms, by the fact above noted that there was not actually in this trial any proof whatever that any of the defendants ever had actual or constructive possession of any substance proved to have consisted of narcotics. In the view which the Court of Appeals took of this whole branch of the case, this last-mentioned aspect apparently assumed special importance (as it should), and it is primarily by reason of this latter feature in the opinion below that we have felt obliged to file this petition for rehearing. We

quote the pertinent portion of the opinion below (Pet. Cert., Appendix 1, pp. A11-A12, including footnote):

> "After reading the indictment to the jury, the judge also read certain pertinent provisions of 21 U. S. C. §174. He told the jury that the section 'provides that whenever a trial for a violation of this section takes place the defendant is shown to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury'; that this 'presumption' does not 'relieve the Government of its obligation to prove every material element of this case beyond a reasonable doubt'; that if the jury believed Curcurato's testimony that he never had possession, 'he doesn't owe any explanation'; and that the jury was to draw no inferences from the failure of Nuccio and Lupo to testify. While this did not follow what the Supreme Court and this court have characterized as the 'better practice' of omitting explicit reference to the statute and simply telling the jury they may draw the inference from possession unless the evidence provides a satisfactory explanation, *United States* v. *Gainey*, 380 U. S. 63, 71 n. 7 (1964); *United States* v. *Armone*, 363 F. 2d 385, 392-93 (2 Cir.), cert. denied, —— U. S. ——" (1966), it would be hypercritical to fault the judge on that account in this case. The importance of the inference permitted by the statute is in relieving the Government of what would otherwise be the necessity of coming forward with evidence of knowledge of illegal importation in every case. The present was the somewhat unusual case where, as to all defendants, the Government's proof had covered precisely that. If the jury believed Henrypierre, the defendants knew they were conspiring to deal in illegally imported narcotics; if

it didn't, there was no substantial evidence that they had conspired to deal in anything. With the bearing of this section of the statute so minimal, it would be absurd to reverse for a slight lapse from perfection in the instruction."[4]

"[4] While the only package the Government was able to subject to analysis did not come into the physical possession of any of the defendants, we adhere to our holdings in *United States* v. *Agueci*, 310 F. 2d 817, 828-29 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), that no proof of actual dealings in narcotics is required to establish conspiracy to violate the narcotics laws and that when such proof is required, as in the case of a substantive count or in order to give rise to the statutory inference from possession, 'just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence'—such as Henrypierre's admissions, the devious methods used, and the amount of money passed. Insofar as *Cook* v. *United States*, 362 F. 2d 548 (9 Cir. 1966), may be to the contrary, we do not agree with it."

Most significant in the above quotation from the opinion of the Court of Appeals is the portion in the above quoted footnote 4, where, referring to the question of whether proof of actual dealings in narcotics is required to establish conspiracy to violate the narcotics laws, the Court held that such may be proved by circumstantial evidence, and stated, "Insofar as *Cook* v. *United States*, 362 F. 2d 548 (9 Cir. 1966), may be to the contrary, we do not agree with it."

In the *Cook* case, *supra*, the Ninth Circuit squarely held that, in a narcotics conspiracy prosecution, before the statutory presumption of knowledge of unlawful importation "can come into play there must be proof that the possessed drugs were in fact narcotic drugs. We note judicially that whether or not a powder or substance is a narcotic cannot be determined by a mere inspection of its outward appearance" (362 F. 2d at p. 549).

In our case, as seen, there was no proof that any of the alleged deliveries by Henrypierre to any of the defendants, deliveries allegedly made in plastic bags containing a white powdery substance, consisted of narcotics. In these circumstances, it was more than enough by the tests of due process and under the fair and proper bounds of circumstantial evidence in Federal criminal prosecutions, for the Government to be allowed to have its case submitted to the Jury on the basis of the alleged circumstantial indications from Henrypierre's testimony as a whole that he and the defendants were allegedly dealing in imported narcotics. It transgressed all proper bounds of due process to allow the Government to have also the benefit of the statutory presumption which in turn presupposes proof of possession of a narcotic drug, when, again, there was not even any proof that any package allegedly possessed by any defendant contained a narcotic drug, and when the statutory presumption was not logically applicable anyhow because the indictment charge was directly and explicitly (and exclusively) a charge of conspiracy to import. The only properly material or relevant evidence for the proof of this latter charge was the testimony of Henrypierre. The statutory presumption had no proper place in this picture.

CONCLUSION

It is respectfully submitted that this joint petition for rehearing should be granted, and that the joint petition for certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule 58(2), i.e., "other substantial grounds available to petitioner[s] although not previously presented".

/s/ JEROME LEWIS
Attorney for Petitioners